LIBRARY
SUPREME COURT, U. S.

JAMES F. DAVEY, Clerk

IN THE

Supreme Court of the United States

October Term, 19[illegible]

No. 345

BRUNO PEPE,

Appellant,

v.

STATE OF DELAWARE,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

JURISDICTIONAL STATEMENT ON APPEAL.

JOHN MERWIN BADER,
BADER & BIGGS,
1211 King Street,
Wilmington, Delaware,
Attorneys for Appellant-Petitioner.

International, 711 So. 8th St., Phila. 47, Pa.

TABLE OF CONTENTS.

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	2
IV. Constitutions and Statutes	3
V. Statement of the Case	5
VI. Argument in Support of the Writ—Argument That the Federal Questions Are Substantial	7
A. If any clear meaning can be drawn from the statute, such meaning excludes petitioner from its scope; otherwise the statute was fatally vague	7
B. The information, failing to set forth any of the elements of a lottery, was fatally defective and a violation of the 14th Amendment	9
VII. Conclusion	11
Appendix A—Opinion of Supreme Court of Delaware	13
Appendix B—Mandate of Supreme Court of Delaware	19

TABLE OF CASES CITED.

	Page
Caldwell v. Texas, (1891) 137 U. S. 692, 11 S. Ct. 224	11
Cleek v. State, (Tenn. 1949) 225 S. W. 2d 70	8
Cline v. Frink Dairy Co., (1927) 274 U. S. 445, 47 S. Ct. 681	8
Francis v. U. S., (1901) 188 U. S. 375, 23 S. Ct. 334	8
International Harvester Company v. Kentucky, (1914) 234 U. S. 216, 34 S. Ct. 853	8
Johnson v. U. S., (C. A. 9th Cir. 1953) 206 F. 2d 806	7
Kohl v. Lehlback, (1895) 160 U. S. 293, 16 S. Ct. 304	11
Plummer v. U. S., (C. A. D. C. 1951) 189 F. 2d 19	8
Scott v. State, (Supreme Ct. Del. 1955) 10 Terry 401, 117 A. 2d 833	7
State v. Hamilton, (Del. 1907) 6 Penn. 433, 67 A. 836	8
State v. Hintenburger, (N. J. 1956) 41 N. J. Super. 597, 125 A. 2d 735	7
State v. Minnick, (Del. 1960) 168 A. 2d 93	11
U. S. v. Rich, (D. C. Ill. 1950) 90 F. Supp. 624	10

STATUTES CITED.

	Page
Delaware Code of 1953, Title 11, Section 661	1, 4, 6, 7, 9, 11
Delaware Constitution, Article 1, Sec. 7	3
Delaware Superior Court Criminal Rules:	
Rule 7(c)	4, 10
Rule 12(b)(2)	5, 7
28 U. S. C. A. § 1257(2) and (3)	2
U. S. Constitution:	
6th Amendment	3
14th Amendment	2, 3, 9

IN THE

Supreme Court of the United States.

No.

OCTOBER TERM, 1956

BRUNO PEPE,

Appellant,

v.

STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT ON APPEAL.

Appellant Bruno Pepe appeals from a judgment of the Supreme Court of Delaware dated May 25, 1961 which affirmed the judgment of the trial court, the Superior Court of the State of Delaware in and for New Castle County, which was a judgment of guilty of the charge of violating Title 11, Section 661 Delaware Code (sale of lottery tickets). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented. In the alternative, should this Court deny the appeal, Appellant respectfully requests the papers herein be treated as a petition for a writ of certiorari.

I. OPINIONS BELOW.

The only opinion of a lower court in this case is that of the Supreme Court of Delaware, which opinion is dated May 10, 1961, and is reported in 171 A. 2d 216. A copy of said opinion is appended hereto as Appendix A.

II. JURISDICTION.

A. The judgment of the Supreme Court of Delaware sought to be reviewed is in the form of a mandate dated May 25, 1961 which affirms a judgment of conviction in the Superior Court of the State of Delaware on which sentence was pronounced January 16, 1961. The case in the Supreme Court of Delaware was docketed as No. 4, 1961, and in the Superior Court was docketed as Criminal Action No. 228, 1960.

B. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(2) and (3).

III. QUESTIONS PRESENTED.

A. Whether the statute under which Petitioner was convicted, which by its terms seeks to prohibit the sale or issuance of lottery tickets or their equivalent, is so vague, ambiguous and uncertain that a criminal conviction under it violates the "due process" provisions of the 14th Amendment to the Constitution of the United States.

B. Whether, if the statute in question is not so vague, uncertain and ambiguous as to offend against the due process requirement of the 14th Amendment, the Supreme Court of Delaware did not give it a construction contrary to the only sensible meaning which could be drawn from its language, thereby bringing within its scope persons, such as petitioner, and acts to which the statute could not by any reasonable construction be made to apply.

C. Whether the criminal information under which petitioner was charged, failing as it did to state any of the legal elements of the offense sought to be charged, was so deficient and defective that a conviction under it constituted a violation of the due process provisions of the 14th Amendment to the Constitution of the United States.

IV. CONSTITUTIONS AND STATUTES.

Article VI Amendments to the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article XIV Amendments to the Constitution of the United States Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Article 1, Sec. 7, Constitution of the State of Delaware (1897).

In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and

fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, unless by the judgment of his peers or by the law of the land.

Title 11, Sec. 661, Delaware Code of 1953.

Whoever sells or disposes of, or has in his possession with intent to sell or dispose of, any lottery policy, certificate, or anything by which such person or any other person promises or guarantees that any particular number, character, ticket, or certificate, shall in the event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt; or

Whoever uses or employs any other device by which such person, or any other person, promises or guarantees as provided in the first paragraph of this section—

Shall, for a first offense, be fined $100 and in default of payment imprisoned 1 month; and, for a second and all subsequent offenses, be fined $100 and imprisoned not less than 1 nor more than 2 months.

Rule 7(c) Superior Court Criminal Rules.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the Attorney General. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in

another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 12(b)(2), Superior Court Criminal Rules.

• • •

(2) Defenses and Objections which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for caus shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment of information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

V. STATEMENT OF THE CASE.

On October 29, 1959, the Vice Squad of the Wilmington, Delaware, police employed an informer to go in a small store in that City and place a lottery policy, or "numbers" bet with the person in charge of the store, who happened to be defendant-petitioner (PA 4, 5).* The informer, one

* PA will refer to Petitioner's Appendix in the Supreme Court of Delaware.

McCray, went in the store as instructed, gave petitioner two silver quarters and told him he wanted to play numbers 786 and 789. Petitioner took the money but did not give McCray any ticket, slip, or other evidence of the numbers play (PA 6, 11).

Petitioner was charged with violating § 661 of Title 11, Delaware Code, and convicted in the Municipal Court of the City of Wilmington, where he was sentenced to be imprisoned for one month and pay a fine of $100.00 and costs. He appealed to the Superior Court, and on a trial *de novo* was again convicted and received the same sentence (PA docket entry 2).

The body of the information on which petitioner was charged in each of the above named courts read as follows:

> "Bruno Pepe on the 29th day of October, 1959 in the County of New Castle did accept a play of twenty-five cents on the numbers 769 and 786 from Dennis McCray, contrary to Title 11, Section 661 of the Delaware Code of 1953."

Petitioner appealed to the Supreme Court of Delaware, where the conviction was sustained. As the opinion of that Court discloses (Appendix A), petitioner argued that a violation of § 661 requires the issuance of a slip, ticket, or other token of the lottery play, and that since none was given, no violation of that statute took place, but at the most a violation of the next following section, which is broader. It does not appear from the opinion, but petitioner also argued that the statute (§ 661) was void for uncertainty.

Petitioner also argued that the information by which he was charged was void for failure to set forth the elements of the offense. In deciding this point the Delaware court did not, in its opinion, either summarize or set forth verbatim the information in question.

The foregoing questions were raised in the Supreme Court of Delaware by Petitioner's brief, in accordance with the practice in Delaware.

The question of the validity of the information was not raised in any lower Delaware Court, but petitioner relied, in the Supreme Court, upon Rule 12(b)(2) of the Superior Court Criminal Rules, which is identical with the Federal Criminal Rule of the same number and which permits the insufficiency of an indictment or information by reason of failing to state an offense to be raised for the first time on appeal.

State v. Hintenburger, (N. J., 1956) 41 N. J. Super. 597, 125 A. 2d 735;
Johnson v. U. S., (C. A. 9th Cir. 1953) 206 F. 2d 806;
Scott v. State, (Supreme Ct. Del. 1955) 10 Terry 401, 117 A. 2d 833.

The question concerning the construction of § 661 as specifically prohibiting the issuance of a lottery ticket, as distinguished from prohibiting lotteries as such, was first raised in the Superior Court by way of motion for judgment of acquittal (PA 6, 7) under Superior Court Criminal Rule 29.

The question concerning the vagueness and ambiguity of § 661 was not raised below in the Supreme Court of Delaware.

Notice of Appeal was filed in the Supreme Court of Delaware on August 15, 1961.

VI. ARGUMENT IN SUPPORT OF THE WRIT—ARGUMENT THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

A. If Any Clear Meaning Can Be Drawn From the Statute, Such Meaning Excludes Petitioner From Its Scope; Otherwise the Statute Was Fatally Vague.

It has been held by this Court that due process requires penal statutes to be explicit enough to inform those

whose acts are sought to be embraced within them just what conduct is prohibited.

> *International Harvester Company v. Kentucky*, (1914) 234 U. S. 216, 34 S. Ct. 853;
> *Cline v. Frink Dairy Co.*, (1927) 274 U. S. 445, 47 S. Ct. 681.

Although a lottery does not in essence require the issuance of a ticket or receipt to the bettor, the statute in question does not purport to prohibit lotteries as such, but only to proscribe the sale or disposition of the physical token or indicia of the wager. The language "or has in his possession with intent to sell or dispose of" is particularly significant, as is the language "or anything by which," considering the context in which the quoted phrases appear. Nowhere in the section is the conducting or carrying on of a lottery made a crime, but the section talks about the selling, disposing of, possessing, or using of tangible indicia, devices, or implements by which a lottery transaction is evidenced or a lottery is carried on.

> See *Francis v. U. S.*, (1901) 188 U. S. 375, 23 S. Ct. 334.

The Delaware Court's reliance upon the language "any other device by which" (171 A. 2d 218) is specious, in view of the authorities which hold that the term "device" as used in gambling statutes means the tangible instrument, contrivance, or thing with or by which money may be bet or won, *as distinguished from the game itself*.

> *Plummer v. U. S.*, (C. A. D. C. 1951) 189 F. 2d 19;
> *Cleek v. State*, (Tenn. 1949) 225 S. W. 2d 70;
> *State v. Hamilton*, (Del. 1907) 6 Penn. 433, 67 A. 836.

The Delaware Supreme Court apparently allowed itself to be carried away by its anti-gambling prejudices and predilections, to the extent that it used what was undoubt-

edly the general legislative purpose of inhibiting the lottery game as an excuse to construe the statute in a way which is not justified by the language which the Legislature employed. In so doing the court confused legislative purpose with legislative intent. This thinking is highlighted by the language of the opinion contained in the second paragraph, first column of 171 A. 2d, page 218, beginning, "We refuse by a possibly literal construction —."

No one was asking the Court to "give (its) approval to a scheme." The Court was asked to construe the statute, and if the operation of the particular "scheme" avoided the statute as drawn, it was not within the legitimate judicial province to extend the statute by a strained construction.

In summary, the statute is fatally vague or else the Delaware Supreme Court construed it contrary to its meaning, especially in the light of the rule that penal statutes are to be strictly construed. The former amounts to a deprivation of due process; the latter *a fortiori* so.

The vice of a vague or ambiguous statute is that it permits a person to be convicted of violating it when he had no reasonably certain basis for knowing in advance that his conduct was criminal. This constitutes deprivation of due process at the hands of the legislative body.

If the statute is sufficiently certain to meet the constitutional test, but the court gives it a variant construction then the defendant is deprived of due process by judicial fiat to the same extent as he is deprived of it in the former case by legislative enactment.

B. The Information, Failing to Set Forth Any of the Elements of a Lottery, Was Fatally Defective and a Violation of the 14th Amendment.

While § 661 of Title 11 does not prohibit lotteries *as such*, it does prohibit certain acts connected with lotteries. Therefore, in order to have a violation of this statute, there

must be involved both a lottery, and a sale or disposition of something. The information in question makes no allusion to a sale and no reference to a lottery. Neither does it make any attempt to set forth the elements of a lottery, which are (1) chance, (2) prize, and (3) consideration.

U. S. v. Rich, (D. C. Ill. 1950) 90 F. Supp. 624.

Even if we accept Delaware's argument that no sale or transfer of anything is required, still there must be a lottery, and so the elements of a lottery must be set forth. The reason why this failure to set forth the elements of the offense can be raised for the first time on appeal is essentially that it renders the information a nullity, so that the defendant in effect was prosecuted without an indictment or information.

It is interesting to note that the opinion of the Supreme Court of Delaware did not quote the body of the information which is under attack. This, together with the language of the opinion, creates the impression that the information was merely inartistically drawn, and that petitioner's grievance was simply that it was lacking in the meticulous particularity required by the common law. A reading of the information, however, discloses that it does not meet the most literal test of sufficiency and specifically does not meet the requirements of Rule 7(c) of the Superior Court Criminal Rules.

In its discussion about the attack upon the information coming too late, the court has further perpetuated this misdirection, and has ignored completely the rule that failure of the information to state an offense can be complained of at any time.

The language "we think the information—informed the defendant of the precise charge against him" displays an erroneous concept of the criterion of informativeness. The criterion is not whether the information, viewed by hindsight, informed the defendant of the nature of the charge against him, but whether it was calculated to in-

form sufficiently an innocent defendant who knew nothing about the crime of which he was accused.

State v. Minnick, (Del. 1960) 168 A. 2d 93, 97.

Some of the reported cases in this area seem at first blush to say that an insufficient indictment or information in a state court is not a violation of due process as contemplated by the 14th Amendment. They say, in effect, that since the state court has jurisdiction to determine the sufficiency of the indictment, its determination, even though unsound, is not a violation of due process.

Caldwell v. Texas, (1891) 137 U. S. 692, 11 S. Ct. 224;

Kohl v. Lehlback, (1895) 160 U. S. 293, 16 S. Ct. 304.

Closer examination of the problem leads to the conclusion that such a statement, as a blanket proposition, is unsound. Specificity of a criminal charge is a fundamental right embedded in Federal and State constitutional law. If denial of counsel, prosecution perjury, and use of illegally obtained evidence are violations of due process, then a totally defective indictment ought to be considered none the less so. Any confusion on this point based upon language in the earlier cases makes it all the more important that the matter be taken up and settled at this time.

VII. CONCLUSION.

That Title 11, Section 661 of the Delaware Code is ambiguous and misleading is illustrated by the fact that the Delaware Supreme Court has given it the most unlikely interpretation conceivable. If the statute has any clear meaning that meaning is not the one given to it by the Delaware Court. The result is that petitioner was deprived of due process—either legislatively, by a statute so vague as to invite guesswork about its meaning, or judicially, by a construction not reasonably suggested by its language and hence not capable of being known in advance.

The information on which petitioner was charged was so hopelessly deficient as to constitute no information at all; hence petitioner was likewise denied due process on this score.

Respectfully submitted,

JOHN MERWIN BADER
OF BADER & BIGGS,
1211 King Street,
Wilmington, Delaware,
Attorney for Appellant-Petitioner.

APPENDIX A.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

BRUNO PEPE,
Appellant,

v.

THE STATE OF DELAWARE,
Appellee.

No. 4, 1961

(May 10, 1961)

SOUTHERLAND, C. J., and WOLCOTT and BRAMHALL, JJ., sitting.

An appeal from the Superior Court in and for New Castle County.

John Merwin Bader, of Wilmington, for appellant.

Charles L. Paruszewski, Deputy Attorney General, for the State.

WOLCOTT, J.:

This is an appeal from a conviction in the Superior Court on a charge of violating 11 *Del. C.* § 661.

On October 29, 1959, at the instigation of the police, one McCray gave the defendant twenty-five cents to be played on numbers 786 and 789. The defendant accepted McCray's money but did not in exchange give him any slip, ticket or receipt as evidence of his play on the said numbers.

Thereafter, the defendant was arrested and charged in the Municipal Court of Wilmington with violation of 11 *Del. C.*, § 661, which reads as follows:

"Whoever sells or disposes of, or has in his possession with intent to sell or dispose of, any lottery policy, certificate, or anything by which such person or any other person promises or guarantees that any particular number, character, ticket, or certificate, shall in the event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt; or

"Whoever uses or employs any other device by which such person, or any other person, promises or guarantees as provided in the first paragraph of this section—

"Shall, for a first offense, be fined $100 and in default of payment imprisoned 1 month; and, for a second and all subsequent offenses, be fined $100 and imprisoned not less than 1 nor more than 2 months."

After conviction, defendant appealed to the Superior Court. An information identical in language with that in the Municipal Court was filed. This information is in the following language:

"Bruno Pepe on the 29th day of October, 1959 in the County of New Castle did accept a play of twenty-five cents on the numbers 769 and 786 from Dennis McCray, contrary to Title 11, Section 661 of the Delaware Code of 1953."

Following his conviction in the Superior Court, defendant took this appeal, and raised three points for our consideration. The three points are as follows:

1. That there can be no violation of 11 *Del. C.*, § 661, unless a ticket or its equivalent is issued to the person making a wager on a number.

2. That the information filed against the defendant is fatally defective.

3. That the trial court abused its discretion in permitting the State to reopen its case after resting in order to present additional evidence to show that the transaction between the defendant and McCray embraced the elements of a lottery.

We take up the defendant's points in the order stated.

Under his first point, defendant concedes that the issuance of a ticket or receipt to the bettor is not an indispensable element of a lottery, but argues that § 661 prohibits only lottery schemes which require the issuance of a ticket or receipt to the bettor. It is thus argued that under the facts of this case no violation of § 661 took place because admittedly the defendant issued no ticket or receipt to McCray.

The question presented is very narrow. In essence, the acceptance of defendant's argument would limit the purview of § 661 to the prohibition of lotteries in which invariably a ticket or receipt is issued in exchange for money bet on a chance. Defendant says that the wording of § 661 requires us to so hold. However, we think not.

This statute was first enacted February 19, 1861 (12 *Laws*, Ch. 33) in substantially its present language. The original act was titled, "An Act Concerning Lottery Policies", and was clearly intended to prohibit the conduct of lotteries which theretofore had been prevalent in this State. The act had as its general purpose the prohibition of all lotteries and not merely, as the defendant argues, the prohibition of the sale of lottery tickets as such. This general legislative purpose seems so clear to us as to warrant no extended discussion. It is clearly indicated by the language, now appearing as the second paragraph of § 661, which would seem to embrace a prohibition against the maintaining of a lottery in any guise.

In view of this general legislative intent—that is, to prohibit all lotteries, and the specific direction that any person who uses "any other device by which" the payment

of money is promised or guaranteed upon the happening of a contingency in the nature of a lottery, we think it would be an outrageous emasculation of the statute to confine its ambit solely to instances where the formality of an exchange of a receipt for a wager is made, even though, as in this case, admittedly money was accepted by the defendant to be wagered on a number.

We refuse by a possibly literal construction of the statutory language to give our approval to a scheme obviously designed by numbers writers to circumvent the law. § 661 in our opinion makes it a crime to hold a lottery and to sell chances in it whether or not there is an actual issuance of a ticket or a receipt which, after all, at best is only evidence of the wager or the purchase of a share in the lottery, the selling of which is specifically made the crime.

This is so clear to us that we think no citation of authority is required to support our construction of the statute, but we however note that courts of other states have disposed of similar cases under similar statutes in the same manner. Cf. *State v. Genova*, 141 Conn. 565, 107 A. 2d 837; *State v. Friedman*, 135 N. J. L. 419, 52 A. 2d 416, aff'd 57 A. 2d 390; *State v. Del Vecchio*, 145 Conn. 549, 145 A. 2d 199.

Defendant cites *Francis v. U. S.*, 188 U. S. 375, 23 S. Ct. 334, in opposition. That case, however, was a prosecution for the violation of a federal statute prohibiting the transportation over state lines of papers, etc., purporting to be chances, shares and interests in a lottery. It was held that the transportation of duplicate papers retained in the possession of the writer did not violate the statute. We think the case not in point for 11 *Del. C.*, § 661, in effect prohibits the holding of a lottery and not merely the dealing with papers.

The second point raised by defendant is that the information filed is fatally defective in that it fails completely to state any of the elements of the offense—that is, the selling of shares in a lottery—since several necessary

elements, it is argued, are indispensable items of a lottery, viz., (1) consideration; (2) a prize or reward greater than the amount of the bet, and (3) chance or contingency.

The information filed against this defendant is inartistically drawn and does not conform to the usual pattern of informations and indictments filed in Delaware courts. No longer, however, does the strict rule of the common law with respect to indictments and informations prevail in this State. Indictments and informations in Delaware now are sufficient in law if drawn with such particularity with the accused will be fully informed of the charge he will be required to meet, and, upon the basis of such information, will be given a reasonable opportunity to prepare his defense, and to permit the pleading in future prosecutions of the proceeding as a bar to further prosecution upon the same facts. *State v. Morrow*, 1 Terry 363, 10 A. 2d 530; *State v. Biendt*, 10 Terry 528, 120 A. 2d 321, and *State v. Martin*, 163 A. 2d 256. We think the information before us informed the defendant of the precise charge against him.

Furthermore, assuming that the information filed was defective even under the present liberal rule, the attack on the sufficiency of the information at this time comes too late. Criminal Rule 7(e) of the Superior Court permits the amendment of an information, as opposed to an indictment, at any time before the verdict, provided that no amendment may be permitted which prejudices substantial rights of a defendant.

If, therefore, the information filed in this case was insufficient to inform the defendant of the crime with which he was charged, an implausible conclusion, upon proper application of the defendant the defective information could have been quashed or dismissed or, by amendment, the State could have corrected any formal deficiencies.

The third and final point raised by the defendant is an abuse of discretion on the part of the trial court in permitting the State to reopen its case after resting.

At the close of the State's case, defendant moved for acquittal on the ground, *inter alia*, that the State had failed to prove the nature and elements of a lottery or, specifically, the so-called numbers game. Upon application of the State therefore, even though the State contends that there was sufficient in the record prior to the motion for acquittal to prove the nature of a lottery, the State was permitted to reopen its case to call as a witness a police officer who described in detail the method of operating a lottery or numbers game. It is this permission now attacked by defendant.

Initially, we note that it is probable that defendant has lost his right to object to the reopening of the State's case since no objection was made on behalf of the defendant during the trial. We, however, do not decide the question upon this basis.

Applications to reopen after resting, particularly before the submission of any evidence on behalf of the defendant, are addressed to the discretion of the trial court. *State v. Patnovic*, 11 Terry 310, 129 A. 2d 780. This being so, the only function of this court on appeal in review of such a ruling is to inquire whether or not the sound judicial discretion of the trial court has been abused. We think, under the circumstances of this case, there has been no such showing.

For the foregoing reasons, the judgment of conviction below is affirmed.

APPENDIX B.

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of the Superior Court of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

State of Delaware,
Plaintiff,

v. No. 228 Cr. A. 1960

Bruno Pepe,
Defendant.

a certain judgment or order was entered on the 16th day of January 1961, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on May 11, 1961, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS The Honorable Clarence A. Southerland, our Chief Justice at Dover, the first day of January, A. D. 1961. Issued May 25, 1961.

T. E. TOWNSEND, JR.,
Clerk of the Supreme Court.

MICRO CARD
TRADE MARK ®
m microcard
22
MATTHEW BENDER & COMPANY
MB
- - 61
PC91